APPENDIX "A".

[R367] (TITLE OMITTED—FILED JAN. 19, 1967)

OPINION OF THE COURT.

This suit was instituted to review the action of the Comptroller in chartering a national bank at Hattiesburg, Mississippi. Thirteen business and professional people, without any banking knowledge or experience, sought and obtained a charter for Southern National Bank of Hattiesburg, Mississippi, with a capitalization of one million dollars.

The plaintiff is a state chartered bank in Hattiesburg. The trade territory served by the two banks in Hattiesburg, within a radius of fifteen miles, has an estimated population of fifty-seven thousand people. The new national bank was established and located within a half block of the main office of the Citizens Bank of Hattiesburg and of the First National Bank of Hattiesburg. Each of these two banks has three branch offices within the trade area and in Forrest County, Mississippi.

The Citizens Bank has a capital structure of one million, two hundred thirty-one thousand dollars with deposits of fourteen million, eight hundred ninety-three thousand dollars.

The First National Bank has a capital structure of two million, six hundred nineteen thousand dollars with deposits amounting to twenty-eight million, eight hundred ten thousand dollars. The two banks vigor-

ously opposed the creation of this new bank and contended that no need existed therefor and that business did not exist to support three banks.

[R368] The plaintiff contends that the action of the Comptroller was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. The Comptroller, on the other hand, contends that his action in creating this national bank was committed by Congress to his discretion and is not reviewable under 5 U.S.C.A., Section 1009. Both sides requested and were granted an informal hearing in Washington on April 16, 1965, but no record was made at the time.

The Comptroller contended that a hearing on such application was not required and with that view, the Court agrees. Much of the contentions here revolves around the erroneous supposition on the part of the contestants that they were entitled to an adversary type of hearing before the Comptroller on the question of the public convenience and necessity of another bank in this municipality.

A competent National Bank Examiner (Ramia) was duly dispatched to Hattiesburg where he spent three days investigating facts and circumstances to report to the Comptroller as to the propriety and necessity for this new bank.

In addition to the two banks and six branches thereof, there are five Savings and Loan Associations

in Hattiesburg with substantial capital structures. There were three banks in Hattiesburg until the 1933 depression, which resulted in the failure of one of them, and the survival of the present two banks.

No other banks have been chartered there in the intervening years, but the six branch banks have been created in recent years. The new national bank contended that the plaintiff bank was ultra conservative and that the other national bank was conservative and that a real need existed for commercial loans to large and small businesses, consumer credit installment loans, real estate, personal and construction loans.

They say substantial profits would increase over each of the first three years of business and the Examiner agreed with that forecast. The organizers pro- [R369] posed to purchase 45% of the stock and to widely distribute the balance of the stock with a limitation of two hundred shares to a stockholder.

The Examiner found from a random sampling of local opinions of business and professional men that another bank is desired although several people stated that the present banks were adequately serving community needs. The organizers were considered people of good standing in the community, but without banking knowledge or experience.

Four of the organizers owned a three story building which they proposed to sell to the bank at cost for its banking house. The Examiner approved the

capital structure and the investment in fixed assets. He viewed the management as marginal because they had no knowledge of or experience in banking.

The Examiner reported that a minor need existed for the establishment of another bank in the area saying: "The economy, together with the population, have shown consistent growth and it is believed that the bank, if approved, would be able to obtain its proportionate share of deposits and loans. It is not believed that the area would suffer to any noticeable degree if the proposed bank were disapproved."

As to the degree of need for the bank, the Examiner reported: "The steady growth of population, industry and business during the past decade and an apparent stable economy have afforded the conservative to ultra conservative existing banks steady growth; another bank in this area should not materially affect these existing banks and other lending institutions." The Examiner recommended that the application for this bank be disapproved.

In due course, this report was made by this Examiner to the Regional Comptroller in Memphis for review and recommendation. The Regional Comptroller (Robson), without any additional investigation, but after conferences with the organizers of the bank and examination and consideration of fiscal information available to him, the Regional Comptroller found that the projected deposit [R370] volume, loan volume, and net earnings are adequate to justify approval of the proposed bank.

The Regional Comptroller noted that a new bank had not been chartered in Hattiesburg for many years. "The area has prospered, continued growth appears likely, and in my opinion, a new bank is justified and will not materially effect (sic) existing banks. It is recommended that this application be approved."

The application was again reviewed and approved by the Organization Division of the department. It was again reviewed and approved by the Economic Division of the department. The Comptroller granted the charter on August 18, 1965, but his testimony showed that he knew nothing, personally or officially, about this matter.

The Congress has committed to the Comptroller of the Currency the power and authority to exercise a sound discretion to charter and put in operation national banks under 12 U.S.C., 1940 ed., Section 21 et seq. That statutory scheme does not expressly require the Comptroller to conduct an adversary hearing on an application for such a charter

He did not act arbitrarily or capriciously in denying an adversary hearing to either of the local banks as contestants of this application and in conducting a summary hearing as he did in this case. The decision of the Comptroller on such application is subject to review by the Court on a plenary action to a limited degree.

Judicial review is not precluded by 5 U.S.C.A. (Cumulative Supplement) Section 1009. The Banking Act does not preclude judicial review and does not provide that the exercise of the discretion therein committed to the Comptroller shall be absolute and final. On the other hand, it is clear from an examination of that section that this state chartered bank is entitled to judicial review of such action as a person affected thereby within the purview of Section 1009(a) and Section 1009(c). The scope of such review is limited by Section 1009(e).

[R371] The plaintiff state bank thus has standing in this Court to institute and maintain this suit for the review of such action of the Comptroller in granting this charter.

This suit cannot be used as a means for substituting the judgment of this Court for that of the Comptroller, but a summary and de novo hearing is envisioned within the statutory scheme to determine whether or not in effect this national bank has been illegally chartered.

That is the view expressed in a case from the Fourth Circuit involving the creation of a branch bank in *First National Bank of Smithfield v. Saxon*, (4CA) 352 F.2d 267, which appears as sound and convincing in this case involving the chartering of a new bank.

The plaintiff proffered the testimony of many bankers in this banking area to the effect that convenience and necessity and the best interest of the

community did not require and would not justify or support a new bank. That testimony was rejected by the Court because it is not relevant to the issue before the Court.

Likewise, the Comptroller injected into this record, over objection, some testimony as to the phenomenal experience of this bank in actual operation. That testimony is rejected by the Court as likewise being outside the range of the issue. The sole issue in this case is as to whether or not the Comptroller acted arbitrarily and capriciously and thus illegally in granting this charter to Southern National Bank of Hattiesburg, Mississippi, on August 18, 1965.

Significantly, even the National Bank Examiner found some need for a new bank. Every official who examined that record and reported his recommendation to the Comptroller said that there was enough business in existence and in prospect to support a new bank without injury to the eight banks in operation in the area.

This Court could not and would not subscribe to that view on this record with this completely inexperienced [R372] group of organizers of this new bank, but it is not within the province of this Court to decide that question on this record. It may not be gainsaid on this record that the Comptroller of the Currency did not act arbitrarily and capriciously and without substantial support and recommendation for the creation of this new bank.

Once it is determined by this Court that facts and circumstances exist on this record to bring into play the expertise of the Comptroller in making a choice as to disputed facts in the exercise of his discretion as to whether or not a new bank would be chartered, then the function of this Court is at an end.

The Comptroller has exercised such a discretion in this case in creating this new bank and his action was not arbitrary, capricious or an abuse of discretion or otherwise not in accordance with law. He simply reached a conclusion not shared in any degree by this Court, but his action was surely not illegal, and this new bank was validly created.

It is the view of this Court that it has full jurisdiction of the parties and the subject matter to do all that is herein done under the Administrative Procedure Act, appearing as 5 U.S.C., Section 1001 et seq. (Cumulative Supplement). There is nothing in the National Banking Act, appearing at 12 U.S.C., 1940 ed., Section 21 et seq. which requires the Comptroller of the Currency to conduct an adversary hearing on an application for a new national bank.

His decision, however, is reviewable in this Court for a determination as to its legality vel non. Any person adversely affected by such a decision may institute an action for the review of such decision. The action for a review, while adversary in nature, may be summary in fashion for a determination as to whether or not facts and circumstances before the

Comptroller afforded him an alternative for the exercise of a sound discretion in doing that which he did.

The Court may not substitute its judgment for [R373] that of the Comptroller under the National Banking Act. The function of the Court is at an end when it is determined that the Comptroller has exercised a sound discretion based upon his expert judgment as to the existence or not of a public convenience and necessity for the new bank. He did that in this case albeit in disagreement with and even contrary to the best judgment of others, including this Court.

The Court has heard and considered this case on its merits. The motion of the defendant for a summary judgment will be overruled. All other pending motions will likewise be overruled. The complaint of the Citizens Bank of Hattiesburg is without merit and will be dismissed A judgment accordingly may be presented.

(S) HAROLD COX,
United States District Judge.

January 18, 1967.

APPENDIX "B".

[R374] (TITLE OMITTED—FILED JAN. 24, 1967)

FINAL JUDGMENT.

This action came on for hearing on a former date and was taken under advisement by the Court. All parties have submitted memoranda of authorities herein and the Court, after considering the law and evidence rendered a written opinion dated January 18, 1967, which has been filed in the records of this cause and the provisions of which are incorporated herein by reference.

It is, therefore, ordered and adjudged that the plaintiff take nothing by this action and that the complaint is hereby dismissed with prejudice. Let no costs be taxed herein.

ORDERED AND ADJUDGED this 23rd day of January, 1967.

(S) HAROLD COX,
United States District Judge

APPENDIX "C".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24568

CITIZENS BANK OF HATTIESBURG, M. D. BRETT and J. W. MANGUM,

Appellants,

versus

WILLIAM B. CAMP, Comptroller of the Currency of the United States,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(December 4, 1967.)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The Citizens Bank of Hattiesburg and two stockholders of the First National Bank of Hattiesburg seek a declaratory judgment that the approval by the Comptroller of the Currency of the application for the chartering of the Southern National Bank of Hattiesburg as a new national bank was unlawful. Pursuant to a full and able opinion, the district court dismissed the complaint.

We need not decide the question of whether a competing bank and stockholders of a second competing bank have standing to challenge the chartering of a new national bank for, assuming such standing arguendo, we agree with the district court that the complaint is without merit.

The present applicable statutes[1] and regulation[2] do not require the Comptroller to hold a formal adversary hearing in determining whether to approve the chartering of a new national bank.[3] The action of the Comptroller is not subject to review by trial de novo.[4] The court may not substitute its judgment for that of the Comptroller.

Upon the present record we cannot hold that the Comptroller denied the appellants a full and fair opportunity to oppose the granting of the charter, that he acted arbitrarily or otherwise illegally. We find no substance in appellants' other contentions. The judgment is AFFIRMED.

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1 12 U.S.C.A. §§ 21, 22 and 26.
2 12 C.F.R. 4.2.
3 Webster Groves Trust Co. v. Saxon, 8 Cir. 1966, 370 F.2d 381; 1 Davis, Administrative Law Treatise §4.04.
4 See authorities cited in note 3.

APPENDIX "D".

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24568

D. C. Docket No. CA 1998

CITIZENS BANK OF HATTIESBURG, M. D. BRETT and J. W. MANGUM,

Appellants,

versus

WILLIAM B. CAMP, Comptroller of the Currency of the United States,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Citizens Bank of Hattiesburg, M. D. Brett and J. W. Mangum, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 4, 1967

Issued as Mandate:

APPENDIX "E".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24568

CITIZENS BANK OF HATTIESBURG, M. D. BRETT and J. W. MANGUM,

Appellants,

versus

WILLIAM B. CAMP, Comptroller of The Currency of The United States,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING EN BANC

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

APPENDIX "F".

12 U.S.C.A., Sections 26 and 27

§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that at least 50 per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking. R.S. § 5168.

§ 27. Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter. R.S. § 5169.

APPENDIX "G".

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving

and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000: *Provided*, That in States with a population of less than one million, and which have no cities located therein with a population exceeding one hundred thousand, the capital shall be not less than $250,000: *Provided*, That in States with a population of less than one-half million, and which have no cities located therein with a population exceeding fifty thousand, the capital shall not be less than $100,000.

APPENDIX "H".

12 U.S.C.A., Section 36(c)

§ 554. Adjudications

(a) This section applies, accordingly to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384.

5 U.S.C.A., Sections 554 and 556

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

Ths subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accord-

ance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

APPENDIX "I".

5 U.S.C.A., Sections 702 and 703.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

APPENDIX "J".

CONSTITUTION OF THE UNITED STATES

Amendment V. Due Process of Law.

"* * * nor be deprived of life, liberty, or property, without due process of law; * * *."

Amendment V. Just Compensation for Property.

"* * * nor shall private property be taken for public use, without just compensation."

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."